Supreme Court, U.S.
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No. 00-1507

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

KEITH MAYDAK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the government, which has the burden of proving that any requested documents are exempt from FOIA's general rule of disclosure, can raise an exemption claim only under 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)") in the face of an opposing party's motion for summary judgment and then, on appeal, be allowed to raise new exemption claims solely on the ground that it elected to withdraw its Exemption 7(A) claim while the case was pending on appeal.

2. Whether the government's failure to raise a FOIA exemption claim in district court must be excused whenever the government on appeal contends, without elaboration, that some of the documents may have been exempt from disclosure under that exemption if the government had raised that exemption claim during the initial district court proceedings.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In this case, the D.C. Circuit held that, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the government could not raise for the first time on appeal or on remand following appeal any exemption claims that it did not raise in the initial district court proceedings. This holding did not fashion any new or sweeping legal principles. It involved nothing more than the application of a rule that the D.C. Circuit has followed for more than two decades — a rule that follows inexorably both from the normal rules of civil litigation and from FOIA's assignment to the government the burden of proving that requested records fall within one or more of the statutory exemptions from disclosure. 5 U.S.C. §§ 552(a)(3), 552(b). That decision is not in conflict with any prior decision of this Court or of any court of appeals, and is plainly correct.

What the government seeks here is a special rule that would allow the government to litigate any FOIA case twice whenever the government invokes FOIA Exemption 7(A) during the initial district court proceedings. Exemption 7(A) allows agencies to withhold "records or information compiled for law enforcement purposes" to the extent that the production of such records or information "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The D.C. Circuit's refusal to adopt such a rule does not conflict with the decisions of this Court or any other court. Finally, even accepting the fundamental premise of the petition — that there are circumstances in which providing evidence in support of other exemption claims would undermine the government's reliance on Exemption 7(A) — this is an inappropriate vehicle for reconciling this purported tension among FOIA exemptions. The government abandoned its reliance on Exemption 7(A) *before* even raising this necessarily case-specific concern. Moreover, the harms that it believes could flow from having to assert multiple exemption claims during an ongoing criminal investigation are simply not present here, particularly since not only the investigation but the trial and appeal were long concluded by the time the government even raised Exemption 7(A) in the first place. The government has never provided any reason that *in this case* it could not have asserted other exemption claims simultaneously, so the D.C. Circuit's refusal to graft onto FOIA a *per se* rule allowing the government to raise its exemption claims piecemeal where Exemption 7(A) is raised and then abandoned on appeal will have a minimal impact, and is therefore a poor candidate for plenary review by this Court.

A. Background

In September 1994, respondent Keith Maydak ("Maydak"), who was then incarcerated, filed a request under FOIA for copies of documents pertaining to or mentioning him. In

September 1995, Maydak's conviction became final when the Third Circuit affirmed Maydak's conviction and Maydak elected not to file a petition for certiorari in this Court.[1] In February 1997, after an initial denial and administrative remand of Maydak's FOIA request, the Executive Office for United States Attorneys ("EOUSA") denied Maydak's request in full, citing Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which allows an agency to withhold records or information to the extent that their production "could reasonably be expected to interfere with enforcement proceedings." *Id.* The only "enforcement proceeding" that the EOUSA cited in its administrative denial was a "Section 2255 motion" that Maydak had filed in August 1996, which had been dismissed in September 1996 but which was on appeal in the Third Circuit. (Pet. App. 3a.) No other FOIA exemptions were cited at any point during the administrative proceedings. (Pet. App. 3a.)

In August 1997, Maydak filed suit pursuant to 5 U.S.C. § 552(a)(4)(B). (Pet. App. 4a.) After receiving the government's answer, which asserted only Exemption 7(A) as a defense to disclosure,[2] Maydak moved for summary judgment, asserting that, because he had already been convicted, there was no "enforcement proceeding" pending against him and the exemption relied upon by the government did not apply. (Pet. App. 4a; Pl. Mot. for Summ. J. at 3-4 (D.D.C. filed Oct. 16, 1997)). The government opposed and cross-moved for summary judgment, contending that

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[1] *See* Joint Appendix of Appellee and Counsel Appointed as *Amicus Curiae* in Support of Appellant, at 25, 82 (D.C. Cir. filed Jan. 27, 2000) (hereafter "J.A."). The petition's suggestion that Maydak's appeal from his criminal conviction was pending at the time his FOIA request was denied in February 1997 is inaccurate. (Pet. at 3.)

[2] *See* Answer (D.D.C. filed Sept. 29, 1997) (J.A. 10-15).

Exemption 7(A) continued to apply after Maydak's conviction had become final because Maydak had filed "a continuous and systematic barrage of" post-conviction motions that collaterally attacked his conviction, and that such filings "have continued, unceasingly, up to the present and can be expected to continue." Def. Mot. for Summ. J. at 13, 24 (D.D.C. filed Nov. 17, 1997). The government maintained that disclosing any of the requested documents would interfere with its ability to respond to the collateral motions and would hinder the government's ability to re-prosecute Maydak were any of the collateral motions successful. (Pet. App. 4a.)

The propriety of the government's reliance on Exemption 7(A) was from the outset highly suspect — no court ever had held that Exemption 7(A) continues to apply after the underlying criminal case to which the records relate has become final and where the records were not otherwise being used in the investigation of other crimes. Indeed, the government's theory appeared to ignore this Court's admonition in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), that Exemption 7(A) was intended to protect against disclosure of information before the government had the opportunity to present its case in court, 437 U.S. at 224-25, and not to "endlessly protect material simply because it was in an investigatory file," *id.* at 230.[3] Despite the shaky ground on which its Exemption 7(A) claim rested, and despite the fact that the government bore the burden of proving that the requested records need not be released, the government did not raise any other FOIA exemptions in the district court. The government mentioned other exemptions that it "tentatively" believed "may" apply, but made clear that it had not reviewed the

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[3] *See also, e.g., Moorefield v. United States Secret Serv.*, 611 F.2d 1021, 1024-25 (5th Cir. 1980) (usually the purpose of investigation expires "when its goal, the holding of an adjudicatory proceeding, is reached").

requested documents to determine whether any such exemptions actually applied and therefore was not asserting such exemptions.[4] On September 1, 1998, the district court denied Maydak's motion for summary judgment and granted the government's cross-motion, agreeing with the government that "release of the documents would interfere with enforcement proceedings because [Maydak] has post-conviction motions and appeals pending." (Pet. App. 21a-22a.)

B. Proceedings in the D.C. Circuit

Maydak appealed. Both parties moved for summary disposition on the question of Exemption 7(A)'s applicability. The D.C. Circuit denied both motions and appointed counsel as *amicus curiae* on behalf of Maydak (who was representing himself).[5] The court directed the parties and *amicus* to brief

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[4] *See, e.g.*, Def. Reply Mem. to Pl. Mot. for Summ. J. at 15-16 (D.D.C. filed Jan. 2, 1998) ("In its Motion for Summary Judgment, . . . the Department of Justice revealed all exemptions that it had *tentatively* identified at the time that *may* apply to the subject documents. . . . In its Motion for Summary Judgment, defendant cited to the various exemptions that *may* apply to the documents notwithstanding the application of Exemption 7(A), e.g., Exemptions (b)(3), (b)(5), (b)(7)(C) and (b)(7)(D).") (emphasis added); Pet. App. 45a (listing "exemptions which *may* be applicable") (emphasis added); Def. Mot. for Summ. J. at 18-19 (conceding that "no comprehensive [document] review has been completed").

[5] The court appointed Jenner & Block, LLC, as *amicus curiae* to present arguments on Maydak's behalf and, in that capacity, undersigned counsel David C. Belt filed an *amicus* brief and participated in oral argument. Undersigned counsel is now representing Maydak before this Court.

whether Exemption 7(A)'s protection of "enforcement proceedings" applies to collateral attacks on a final conviction.[6]

Rather than risk a potentially adverse decision on that question, the government informed Maydak that it was abandoning altogether its reliance on Exemption 7(A), claiming that the exemption no longer applied because the Third Circuit had affirmed the dismissal of one of Maydak's numerous collateral motions. The government did not claim that the Third Circuit's ruling *required* it to abandon its Exemption 7(A) claim. Nor could it, since it has long been settled law in the D.C. Circuit that, in determining whether requested documents were properly withheld, "court review properly focuses on the time the determination to withhold is made," not the time of the court's review of that decision. *Bonner v. United States Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (R.B. Ginsburg, J.). Moreover, the Third Circuit ruled on only one of Maydak's collateral motions; as the government was made aware prior to withdrawing its Exemption 7(A) claim, Maydak still had several collateral motions pending and contemplated filing several more, including a petition for certiorari from the Third Circuit's ruling. The government

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[6] Specifically, the D.C. Circuit directed briefing on the following:

> (1) whether FOIA Exemption 7(A) continues to apply as long as a criminal defendant is pursuing a post-conviction collateral attack on the judgment or sentence entered in a criminal enforcement proceeding to which the withheld records relate; and (2) whether appellee, through its submissions below, met its burden of justifying its invocation of Exemption 7(A) to shield all the records it identified as falling within the various record categories, as well as the residual records not specifically categorized . . . .

Order, at 1-2 (D.C. Cir. Mar. 24, 1999) (Pet. App. 6a.)

could have continued to maintain that Exemption 7(A) applied at the time of its February 1997 decision to deny Maydak's request, and thus might have avoided all the questions and concerns that it now manufactures in this petition.

Having chosen to abandon its reliance on the only exemption claim it presented in the district court, the government then sought to have its cake and eat it too. Rather than turn over the documents that Maydak requested, the government on August 26, 1999, filed in the D.C. Circuit a Further Motion for Remand Based on Changed Circumstances ("Further Motion for Remand"), which sought a remand to administratively "reprocess the [requested] documents and release them insofar as other FOIA exemptions do not apply to them." Appellee's Further Motion for Remand at 3 (D.C. Cir. filed Aug. 26, 1999).[7] Maydak and *amicus* opposed the remand motion, arguing that the government was foreclosed from asserting new exemption claims — let alone ascertaining whether even to assert new exemption claims — because it had failed to raise them in the initial district court proceedings and because the Third Circuit's ruling on one of Maydak's collateral attacks did not materially change the factual context of the case. The government again conceded that it had not raised other exemptions in the district court; indeed, it claimed that Maydak's opposition to its motion was "premature" precisely because "other exemptions have not been asserted as the reprocessing has not taken place." Appellee's Reply to Appellant's and Amicus Curiae's Oppositions to Motion for Further Remand at 6 (D.C. Cir. filed Sept. 29, 1999). A declaration attached to the government's Further Motion for

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[7] This was the government's second attempt to have the case remanded; the first request, filed almost immediately after the D.C. Circuit ordered briefing, conceded partial error. (Pet. App. 6a.) That motion was pending at the time of the government's Further Motion for Remand.

Remand estimated that it would take approximately four weeks to "review, process and effect release of the documents to which Maydak may be entitled."[8] The D.C. Circuit referred the Further Motion for Remand to a merits panel.

After full briefing and argument, at which the government again conceded that it had not reviewed the documents to determine whether other exemptions applied while the case was pending in the district court, a panel of Judges Silberman, Sentelle, and Rogers rejected the government's request to begin the administrative process anew. Relying on the well-established rule of that Circuit that the government ordinarily "must raise all its claims of exemption in the original proceedings in district court, and may not thereafter assert new claims of exemption, either on appeal or on remand following appeal," *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 795 F.2d 205, 208 (D.C. Cir. 1986) (Scalia, J.), the panel first concluded that the government failed to raise any exemptions other than Exemption 7(A) in the initial district court proceedings. (Pet. App. 8a-10a.) The court then rejected the government's two arguments for why it should be excused for that failure: that the "unique nature of its burden of proof under Exemption 7(A)" relieves it of "even attempting to substantiate its claims with respect to . . . other exemptions," (Pet. App. 10a-14a), and that the Third Circuit's decision as to one of Maydak's collateral motions constituted a "substantial change in the factual or legal context of this case," (Pet. App. 14a-16a). Finally, the panel declined to exercise its discretion under 28 U.S.C. § 2106 to remand the case, reasoning that the interests in "judicial finality and economy, avoiding delay, and fairness" outweighed the government's eleventh-hour and unsupported assertions that some of the information sought

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[8] Decl. of Suzanne Little at 5 (D.C. Cir. filed Aug. 26, 1999) (J.A. 143).

would have been protected by other FOIA exemptions had it raised them. (Pet. App. 16a-18a.)

REASONS TO DENY THE PETITION

I. The D.C. Circuit's Decision Is Consistent with Prior Decisions of this Court and Does Not Conflict with Any Decision of Another Court of Appeals.

A. The D.C. Circuit Correctly Applied Settled Litigation Principles in Determining That the Government, Which Bears the Burden of Proof on the Applicability of FOIA Exemptions, May Not Prevail on Exemption Claims That it Did Not Raise in the Initial District Court Proceedings.

The D.C. Circuit's opinion applied the long-established proposition that, because the government has the burden of raising and proving the applicability of any FOIA exemptions, the government ordinarily "must raise all its claims of exemption in the original proceedings in district court, and may not thereafter assert new claims of exemption, either on appeal or on remand following appeal." *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 795 F.2d 205, 208 (D.C. Cir. 1986) (Scalia, J.); *accord Ryan v. DOJ*, 617 F.2d 781, 789 (D.C. Cir. 1980); *Jordan v. DOJ*, 591 F.2d 753, 780 (D.C. Cir. 1978). There is nothing new about this rule, and it does not conflict with the decisions of this Court or any other court. Nor is it specific to the FOIA context; courts routinely have followed some variant of the rule that a party that bears the burden of persuasion, or even the burden of production, on an issue must present that issue in the trial court. *See, e.g., Arizona v. California*, 530 U.S. 392, 409 n.3 (2000); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980); *Miller v. Avirom*, 384 F.2d 319, 321-22 (D.C. Cir. 1967) (explaining that rule confining appellate courts to issues raised and preserved

initially in trial court reflects "considerations of fairness to the court and the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact," and "prevents the trial of cases piecemeal or in installment") (citations omitted; *cited in Jordan*, 591 F.2d at 779 n.114). *See also District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984) (Without rule that party must raise its arguments at first opportunity in trial court, "[e]normous confusion and interminable delay would result. . . . Almost every case would in effect be tried twice.").

Moreover, the D.C. Circuit's approach is fully consistent with black-letter principles governing summary judgment. As in any civil litigation, where, as here, "the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to 'make a showing sufficient to establish the existence of an element essential to [its] case.'" *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (while "general factual allegations" may suffice at pleading stage, party with burden of proof must produce actual evidence at summary judgment stage in support of its claims); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (summary judgment mandated, on motion, against party who fails to make a showing sufficient to establish essential element "on which that party will bear the burden of proof at trial").

The application of these principles to this case could not have been more straightforward. Once Maydak moved for summary judgment and demanded disclosure of the responsive documents, the government, which bore the ultimate burden of proving that the documents were exempt from disclosure, *see United States Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), had the burden of coming forward with evidence that its

continued withholding of the requested documents was proper. The government chose to come forward with evidence only in support of its Exemption 7(A) claim — as the D.C. Circuit found, the government never "even claim[ed] that it tried to satisfy [its] burden of proof" under another exemption. (Pet. App. 10a.) Accordingly, once the government withdrew its reliance on Exemption 7(A), no issue of fact remained as to whether the government's withholding was proper, and the D.C. Circuit correctly concluded that Maydak was entitled to judgment as a matter of law.[9]

The precedents of this Court on which the petition relies are not inconsistent with — and indeed completely support — the D.C. Circuit's disposition of the issues here. For example, in *Fountain v. Filson*, 336 U.S. 681 (1949), this Court concluded that the D.C. Circuit erred when, having reversed the district court's grant of the defendant's motion for summary judgment on one issue, it directed the entry of summary judgment for plaintiffs on a different issue as to which the defendants "had no opportunity to present a defense before the trial court." *Id.* at 683. The defendants lacked the opportunity to present a defense, the Court made clear, because plaintiffs had never themselves moved for summary judgment. *Id.* Here, Maydak *did* move for summary judgment, seeking an order compelling disclosure of the requested documents; under *Fountain*, and *Celotex*, and Fed. R. Civ. P. 56(c), this placed the burden on the government of presenting evidence in favor of any exemption claims that it wished to assert. Its failure to do so, despite having the burden of proof, aligns the D.C.

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[9] Contrary to the petitioner's suggestion (Pet. at 18-19), nothing in the D.C. Circuit's opinion required that the government, in order to "raise" an exemption claim, itself move for summary judgment on the basis of that claim. The D.C. Circuit stated only that the government must at least "attempt to substantiate those claims" with evidence. (Pet. App. 9a.)

Circuit's resolution perfectly with this Court's decision in *Fountain*.[10]

The government half-heartedly indicates that it did "raise" other FOIA exemptions by mentioning in its district court papers the "potential" applicability of exemptions other than 7(A). (Pet. at 4-5, 20-21.) But the D.C. Circuit squarely rejected that suggestion, concluding that the government's "cursory, equivocal, and inconsistent" assertions that other exemptions "may" apply, combined with the government's repeated acknowledgment that it never actually "processed" the documents to determine whether such exemptions in fact applied, much less attempted to substantiate any such claims in the district court, was insufficient to raise such exemptions. (Pet. App. 8a-9a.) The D.C. Circuit's decision on this point is plainly correct; the government's burden under settled summary judgment principles is to come forward with evidence, not bald and conditional allegations. In any event, the government has repeatedly conceded throughout this litigation that it did not raise any other exemption claims in the district court. Indeed, the government's Motion For Further Remand Based on Changed Circumstances argued that a remand — rather than outright reversal — was appropriate precisely because it had *not* raised other exemptions.[11]

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[10] The other cases cited in the petition (*see* Pet. at 20 & n.12) merely apply the same principle set forth in *Fountain* that an appellate court may not rule as a matter of law in one party's favor on an issue as to which the opposing party has not had a fair opportunity to respond. *See, e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 156 (1963) (declining to issue an injunction based on evidence that was never admitted into evidence and as to which the defendants never had an opportunity to object).

[11] *See* Appellee's Reply to Appellant's and Amicus Curiae's Oppositions to Motion for Further Remand at 6 (D.C. Cir. filed Sept. 29, 1999) (asserting that *amicus*'s claim that the government be required to

B. The D.C. Circuit's Refusal to Graft onto FOIA a Special Exception for Cases in Which an Exemption 7(A) Claim Is Raised and Abandoned Is Not in Conflict with this Court's Decision in *NLRB v. Robbins Tire & Rubber Co.* Or with a Decision of Any Court of Appeals.

The government's principal argument in its petition is that this settled law should not apply here, and that a new and different rule ought to apply when an Exemption 7(A) claim is involved because, the government posits, Exemption 7(A) does not require the same "individualized" showing that other exemption claims demand. (Pet. at 8-9.) The D.C. Circuit's refusal to adopt such a new rule does not conflict with any decision of this Court or of any other court of appeals.

Certainly, nothing in the text of FOIA supports such a special rule for Exemption 7(A) — as the D.C. Circuit recognized, on the face of the statute "Exemption 7(A) is simply one [exemption] on a list of many." (Pet. App. 11a.) Nor, contrary to the government's claims, does this Court's holding in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), mandate such preferential status for Exemption 7(A). *Robbins Tire* stands for the proposition that Exemption 7(A) does not foreclose courts from determining that, "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 234-36. *Robbins Tire* thus relieved the government of having to prove in all cases that disclosure of such records would *actually* interfere with the *particular* proceeding at issue.

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released requested documents rather than raise additional exemptions "is premature. *At present, other exemptions have not been asserted* as the reprocessing has not taken place. As such, there is no pending controversy with regard to assertion of other exemptions.") (emphasis added).

Id. Nothing in *Robbins Tire* purported to prescribe a particular method of establishing an Exemption 7(A) claim, nor suggested that the government cannot raise an Exemption 7(A) claim simultaneously with other exemption claims.[12] Indeed, the government there raised several exemption claims in addition to its Exemption 7(A) claim. 437 U.S. at 216-17, 219 & n.3. The decision below is thus entirely consistent with *Robbins Tire*.

Nor does the D.C. Circuit's decision conflict with the decisions of other Circuits. Indeed, none of the cases cited in the petition even presented the question that the government now asks — whether the assertion of Exemption 7(A) forgives the failure to raise other exemption claims in the district court proceeding or whether raising other claims simultaneously would reveal information protected by Exemption 7(A). *Curran v. DOJ*, 813 F.2d 473 (1st Cir. 1987) (Pet. at 9), and *Solar Sources, Inc. v. United States*, 142 F.3d 1033 (7th Cir. 1998) (Pet. at 9), presented questions involving whether the government's Exemption 7(A) showing provided the district court an adequate factual basis from which to rule on *that* exemption's applicability. Because here the government

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[12] The only textual support in *Robbins Tire* cited by the government for the proposition that Exemption 7(A) is "unique" is the *dictum* in which the Court noted that, while Exemptions 7(B), 7(C), and 7(D) "refer to particular cases," Exemption 7(A) "speaks in the plural voice about 'enforcement proceedings.'" (Pet. at 12-13, quoting *Robbins Tire*, 437 U.S. at 223-24.) But in *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), this Court quoted that passage from *Robbins Tire* and squarely rejected any claim that this *dictum* establishes the "uniqueness" of Exemption 7(A). *See* 489 U.S. at 776-77. *Accord DOJ v. Landano*, 508 U.S. 165, 179 (1993) (under Exemption 7(D), "[t]here may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred"); *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983) (same under Exemption 5).

abandoned on appeal its reliance on that exemption, these questions were not before the D.C. Circuit. And neither *Curran* nor *Solar Sources* involved a situation where the government sought to raise more than one exemption claim, let alone to raise exemption claims in a piecemeal fashion.

The other cases the government cites involve circumstances where the government *did* raise multiple exemption claims in the initial district court proceeding — ironic, given the petitioner's suggestions that it cannot be done. *See Barney v. IRS*, 618 F.2d 1268 (8th Cir. 1980) (per curiam); *Dickerson v. DOJ*, 992 F.2d 1426 (6th Cir. 1993); *Chilivis v. SEC*, 673 F.2d 1205 (11th Cir. 1982).[13] More important, the holdings of those cases do not conflict with that of the D.C. Circuit here. The question at issue in *Barney* and *Dickerson* was simply whether the government adequately proved its Exemption 7(A) claim, not whether other exemption claims

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[13] In *Barney*, the government raised, and the district court ruled on, claims under both Exemption 7(A) and Exemption 3, 618 F.2d at 1271, and the Eighth Circuit suggested that the same analysis, and the same degree of factual substantiation, could apply to both claims. *Id.* at 1274 n.15. In *Dickerson*, the government simultaneously raised claims under Exemption 7(A), 7(C), 7(D) and 7(E). *See* 992 F.2d at 1428; *id.* at 1434 (Beckwith, J., concurring) (noting that "the trial court considered each of the cited exemptions" and opining that "each of the four exemptions . . . supports the nondisclosure of some or all of the documents"). These cases are just some of the many examples in which the government raised an Exemption 7(A) simultaneously with other exemption claims. *See, e.g., Avondale Indus., Inc. v. NLRB*, 90 F.3d 955 (5th Cir. 1996); *Computer Prof'ls for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 901-03 (D.C. Cir. 1996); *Manna v. DOJ*, 51 F.3d 1158 (3d Cir. 1995); *Marzen v. Department of Health & Human Servs.*, 825 F.2d 1148 (7th Cir. 1987); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980). Indeed, respondent has been unable to locate even a single case in which the government has contended that it could not raise other exemption claims without harming a criminal investigation or otherwise compromising its ability to rely on Exemption 7(A).

need be (or could have been) raised. And *Chilivis v. SEC* involved solely the question of whether the government waived exemption claims that were not presented in *its own* motion to dismiss or *its own* motion for summary judgment, even where such claims were presented later *in the original district court proceeding*. The Eleventh Circuit concluded that neither motion was a "responsive pleading" for purposes of Fed. R. Civ. P. 8(c) and that, accordingly, the government "had no obligation to raise all applicable affirmative defenses" in either motion. 673 F.2d at 1209. Because the government *did* raise all its exemption claims in the initial district court proceedings, the court had no occasion to even address the question presented to the D.C. Circuit: whether the failure to raise such claims in response to the *opposing party's* motion for summary judgment, or at any other point in the district court proceedings, precludes the government from raising such claims at a later time.

Finally, none of these cases suggests that Exemption 7(A) somehow relieves the government from having to even review all of the requested documents. The government's suggestion to the contrary relies on a misunderstanding of *Robbins Tire* that has been *rejected* by every court of appeals to have considered it. *See, e.g., Crancer v. DOJ*, 999 F.2d 1302, 1309-10 (8th Cir. 1993) (even where making a categorical showing of "interference," government "must conduct a document-by-document review"); *Bevis v. Department of State*, 801 F.2d 1386, 1389-90 (D.C. Cir. 1986) (agency following categorical approach "must conduct a document-by-document review in order to assign documents to the proper category"). The government's assumption that Exemption 7(A) allows the government to protect its entire investigatory file, without seriously reviewing the requested documents, is merely a variant of the "blanket exemption" concept that this Court has expressly foreclosed. *Robbins Tire*, 437 U.S. at 236

(Exemption 7(A) "was designed to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory records compiled for law enforcement purposes . . . ."); *see also North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989) (R.B. Ginsburg, J.) ("Exemption 7(A) does not authorize automatic or wholesale withholding of records or information simply because the material is related to an enforcement proceeding."). The case law is unanimous that, regardless of what exemption claims the government ultimately asserts, the government actually must review the requested documents.

II. The Facts of this Case Do Not Present the Questions or Concerns Posited by the Government That Would Follow from Having to Raise Multiple Exemption Claims Simultaneously.

Lacking either a conflict among the Circuits or any inconsistency with this Court's decision in *Robbins Tire*, the petition ultimately falls back on an abstract belief that it is somehow unfair to expect the government, when it is in the midst of an active investigation or in the heat of a criminal trial, to defer resources and personnel from that active investigation or trial to root through individual documents in response to a FOIA request where Exemption 7(A) simply would protect all documents responsive to the request. Nothing in this case presents the concerns raised by the government.

First, the purported belief that the mere document-review effort could effect its own type of "interference" by deferring agency personnel and resources away from the pending investigation or trial to which the requested documents relate, (Pet. at 16), is misplaced. No such argument of "interference" was, or could be, presented *here*. (Pet. App. 14a, 18a.) The government has never asserted that Maydak's request was so broad that it would have been unduly burdensome to even

review the sought-after documents. More important, the government could not claim that the time and energy expended in reviewing such documents would have delayed, or deferred personnel away from, the enforcement proceedings or investigation against Maydak. He already had been tried and convicted. There was no investigation. This case, in short, is a closed, garden-variety criminal case, and does not involve the type of situation (if such a situation exists) where even responding to a FOIA request could amount to the type of "interference" contemplated by Exemption 7(A).[14]

Second, the assumption that any portions of the file would have been protected by Exemption 7(A) begs the very question that the government declined to have answered in this case: whether Exemption 7(A) continues to apply where the contemplated "proceeding" — here, a criminal trial — has occurred and is final, and where the only remaining litigation consists of collateral attacks to the outcome of that proceeding. It is far from obvious that the government would have been successful on that claim had it not withdrawn it. Specifically, the government has never explained why the types of "interference" with enforcement proceedings that this Court recognized in *Robbins Tire* — for example, tipping off potential targets of an ongoing investigation, or revealing the government's litigation strategy or the identity of the witnesses against a potential defendant, *see* 437 U.S. at 239-41 — remained likely once Maydak, the subject of the criminal

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[14] The D.C. Circuit expressly recognized that certain "unusual situations" would require a departure from the normal rule that all exemption claims must be raised in the initial proceedings (Pet. App. 14a), and that it maintains the discretion under 28 U.S.C. § 2106 to remand a case where, for example, there is a basis for believing that "dire consequences will flow from the release of the requested documents" (Pet. App. 18a.). But it correctly held that this is not such a case.

investigation, was convicted, and thus necessarily learned the nature of the case against him, the adverse witnesses, and the government's litigation strategy, and certainly could not avoid the charges. Therefore, *this* case presents none of the concerns — "let[ting] the cat out of the investigative bag" (Pet. at 9, citation omitted); prematurely disclosing "the government's investigative and litigation strategies and witness identities" (Pet. at 13); revealing "to other subjects what evidence the government has (or does not have), and the scope and direction of its investigation" (Pet. at 17); or "disclosing detailed information that would help the [defendant] frustrate the government's case" (Pet. at 17) — on which the government's petition is based, and thus is an improper vehicle to raise them in the abstract.

In addition, nothing in the D.C. Circuit's opinion opens the door to these types of interference in *other* cases. The D.C. Circuit recognized that flexible, case-specific measures must be employed to ensure that an adequate factual foundation for an exemption claim is provided while avoiding requiring a level of proof of *any* exemption claim that would reveal information alleged to be protected by, or otherwise defeat the purpose of, any FOIA exemption. (Pet. App. 13a.)[15] Although the petitioner complains that the D.C. Circuit was "unable to offer any guidance on how the government was to perform the balancing act" of raising multiple exemption claims simultaneously (Pet. at 23), that question was not before the

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[15] This recognition, which furthers Congress's intent to provide "workable rules" of FOIA disclosure, *Reporters Comm. for Freedom of Press*, 489 U.S. at 779 (citation omitted), is consistent with the D.C. Circuit's prior decisions and those of all other Circuits. *See, e.g., Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995); *Maynard v. CIA*, 986 F.2d 862, 866-68 (1st Cir. 1993); *Vaughn v. United States*, 936 F.2d 862, 867 (6th Cir. 1991).

D.C. Circuit, for, as discussed above, the government raised only an Exemption 7(A) in the district court, and had abandoned even that exemption claim on appeal. If in the future the government believes it is confronted with an unusual circumstance where asserting other exemption claims along with an Exemption 7(A) claim would compromise its Exemption 7(A) claim, nothing in the D.C. Circuit's opinion prevents the government from seeking a departure from the general rule requiring the government to raise its defenses in the initial proceedings. If it does not receive a departure, it may return to this Court with a concrete, rather than hypothetical, explanation for why it could not assert multiple exemption claims simultaneously. But *this* case involves no such circumstance.

III. There Is No Independent Need to Review the Government's Contention That the Requested Records May Have in Part Been Subject to Other FOIA Exemptions Had the Government Raised Such Exemptions.

Finally, the petition completely mischaracterizes the D.C. Circuit's opinion as ordering the production of "lawfully withheld" information, such as "grand jury materials" and materials that "implicate the privacy interests of third parties," simply "to punish the government for perceived missteps." (Pet. at 24.) This misreading of the D.C. Circuit's decision plainly does not raise any issue warranting plenary review. Nothing in the D.C. Circuit's opinion suggested that it was punishing the government. And the assumption that some information in the government's files may have been protected by other exemptions — and thus were "properly and lawfully" withheld (Pet. at 24) — is nothing more than a thinly veiled attempt to write out of the statute the government's burden of proof. FOIA presumes that *all* requested information is "unlawfully" withheld unless the government *proves* that such

information is subject to a valid exemption; it was this failure to present proof, and not the (still unknown) nature of the information itself, that renders the government's continued withholding improper.

The government does not allege any conflict among the Circuits on this issue. Moreover, contrary to the government's claim, there does not even exist any "tension" between the D.C. Circuit's decision here and the cases cited in the petition relating to the government's still-unsubstantiated assertion that the requested documents contain "confidential" or "personal" information about third parties. (Pet. at 27.) Each of the cited cases dealt with whether information that the government *proved* to be otherwise protected by Exemptions 6 or 7(C), 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C) — *i.e.*, information in which a person has a reasonable expectation of privacy — automatically loses its protection because it was made publicly available in the past, either by the government, *see, e.g., Sherman v. United States Dep't of the Army*, 244 F.3d 357, 363-64 (5th Cir. 2001) (fact that Army has made public in past social security numbers of service personnel does not amount to "waiver" of Exemption 6 where government establishes that individuals' privacy interest in their social security numbers is substantial and that individuals themselves did not waive such interest), or by the person about whom such information pertains, *see, e.g., Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993) (Exemption 7(C) protection not necessarily lost "even where the information may have been public at one time").[16]

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[16] *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989) (en banc) (Breyer, J.), involved an interpretation of the "confidential source" exclusion found in Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), not Exemptions 6 or 7(C). In any event, the court there applied principles analogous to those applied by the other cases cited in the petition — concluding that "public testimony by 'confidential sources' cannot 'waive' the FBI's right under the second clause

In other words, each case involves a situation where a FOIA requester seeks to rebut the government's *prima facie* showing that there is a substantial privacy interest in the information sought — not, as here, where the government simply failed to make any showing that any such privacy interest existed at all.

The claim that this case involves "grand jury materials" that may have been "otherwise protected" by Fed. R. Crim. P. 6(e), is similarly unworthy of this Court's review. The decisions the government cites recognize the fact-specific inquiry in claims seeking the disclosure of grand jury material. *See, e.g., Douglas Oil Co. v. Petrol Stops N.W.*, 441 U.S. 211, 219 (1979). Not only has the government never provided any basis for evaluating the material at issue in this case and the interests (if any) that would be compromised by its disclosure, this is a fact-bound question not warranting this Court's plenary review.

To be sure, the FOIA exemptions involve information that Congress decided need not be produced. But Congress also decided to impose on the government the burden of proving that these exemptions apply to the requested documents. The D.C. Circuit held merely that, where the government has not proved that requested records are exempt, it must disclose them and generally may not relitigate the case by asserting new, heretofore unraised, exemption claims. As discussed above, this conclusion broke no new ground, is consistent with the prior decisions of this Court, and is plainly correct.

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of exemption 7(D) to withhold 'information furnished by a confidential source' and not actually revealed in public." *See* 880 F.2d at 1456-57. These principles are inapposite to the question resolved by the D.C. Circuit: whether the government, which has the initial burden of proving the applicability of an exemption, "waives" a claim to a particular exemption by not raising it in the district court proceedings.

CONCLUSION

The petition should be denied.

Respectfully Submitted,

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